IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 467 OF 1991

Mr.Abdul Majid Bakaridi @ Bakshi
Age : 57 years,
R/o. H.No.690. Islampura,
Taluka Malegaon,
Dist. Nashik ... **Appellant (Orig. Defendant)**

Versus

Smt.Marayambee Jajashabbir Ahmed
Age : 45 years,
R/o. H. No.460,
Malegaon Camp,
Dist. Nashik. ... **Respondent (Orig. Plaintiff)**

Mr. C.G. Gavanekar, Advocate for Appellant
Mr. V.A. Thorat, Advocate for Respondent

CORAM : ***S.R.SATHE,J.***
DATED : ***20th NOVEMBER, 2006***

ORAL JUDGEMENT :-

1. The Appellant, original defendant in Regular Civil Suit No. 13/1984 has preferred this appeal against the judgement and order passed by the Court of Additional District Judge, Malegaon whereby the order of dismissing the Plaintiff's suit for declaration and injunction passed by the Trial Court was set aside and the appeal was partly allowed and it was declared that the decree passed in Regular Civil Suit No. 132/1981 by the Court of Civil Judge, J.D., Malegaon is not binding on the Plaintiff. For the sake of convenience hereafter

the parties shall be referred to as *'Plaintiff'* and *'Defendant'*.

2. The brief facts giving rise to this appeal are as under :-

The house property bearing City Survey No. 460 situated at Malegaon, District : Nashik is owned by defendant. On 08/03/1980, the defendant agreed to sell two rooms out of the property i.e. one room situated on the ground floor and one room on the first floor on the eastern side of the said property to the Plaintiff for Rs. 6,500/- and accordingly, executed an agreement of sale by accepting earnest amount of Rs. 3,000/-. As per the terms and conditions of the said agreement, it was agreed that prior to execution of the said Sale Deed Plaintiff shall hand over the possession of the one room on the eastern side to the Defendant and the Defendant shall take the possession of one room situated on first floor from the tenant and hand over the same to the defendant. However, as no arrangements could be worked out as mentioned above, though the Plaintiff was ready and willing to perform her part of the contract, Sale deed could not be executed. With a view that there should be some reason for not executing the Sale Deed, the defendant issued a false notice

dated 19/01/1981 to the Plaintiff's husband. On the basis of the said notice, the defendant filed Regular Civil Suit No.132/1981 against Plaintiff's husband for recovery of arrears of rent and possession of the two rooms situated on ground floor. As Plaintiff's husband did not file his Written Statement in the said suit, it was proceeded exparte and ultimately, exparte decree was passed against the Plaintiff's husband. According to present Plaintiff, her husband was never a tenant in the suit property and defendant obtained exparte decree. However, when defendant came alongwith bailiff to take possession. Plaintiff obstructed the same and as such decree could not be executed. According to Plaintiff, she is in fact the tenant in the suit premises and as such the decree passed in Regular Civil Suit No.132/1981 was not binding on her. Hence, the Plaintiff has filed the present suit for declaration that the decree obtained by the Defendant against Plaintiff's husband in Regular Civil Suit No.132/1981 is not binding on her and also for declaration that the Plaintiff is a tenant in the suit property. The said suit was opposed by the Defendant on several grounds by filing Written Statement at Exh-34. Firstly, she contended that prior to filing of the suit, it was necessary for the Plaintiff to issue notice and the

suit is bad for want of notice. Secondly, she contended that suit is bad for non-joinder of necessary parties.

3. The defendant admitted that on 08/03/1980, he has executed an agreement to Sale in favour of Plaintiff. He further contended that the possession of one room situated on the ground floor in western portion of the property is with Plaintiff's husband and since beginning he is residing there as tenant. He also contended that he had not handed over the possession to Plaintiff by way of part performance nor the tenancy rights of the Plaintiff's husband were terminated at that time. As a result of the same, till the execution of the Sale Deed, it was the responsibility of the Plaintiff's husband to pay monthly rent regularly to the defendant.

4. The defendant also contended that as it was impossible for him to hand over the possession of the room situated on the first floor, it was not possible to execute the Sale Deed and agreement to Sale is also barred by limitation. The defendant also contended that Plaintiff's husband was in occupation of the premises as tenant and he was residing there alongwith his family members including Plaintiff. He, therefore,

contended that the decree passed in Regular Civil Suit No. 132/1981 is binding on the Plaintiff and Plaintiff is not entitled to get declaration as prayed. Hence on all these grounds, the defendant prayed for the dismissal of the suit.

5. On these pleadings, the learned Trial Judge framed issues at Exh-37. In order to prove the suit claimed, Plaintiff examined herself at Exh-53 and two witnesses namely Mohamed Mohiuddin Exh-57 and Kadir Khan Exh-58. She also produced certain documents. As against this, the defendant did not step into the witness box and adduced any evidence.

6. After considering the evidence on record, the learned Trial Judge held that the ground floor room was in possession of husband of Plaintiff in his capacity as a tenant and even after the execution of the agreement to Sale, the said possession continued and as such the decree obtained by the defendant against Plaintiff's husband in Regular Civil Suit No.132/1981 is binding on the Plaintiff, she being the wife of a person against whom the decree for possession was obtained. The learned Trial Judge therefore dismissed the Plaintiff's suit.

7. Being aggrieved by the said judgement and order, the Plaintiff filed First Appeal in the Court of Additional District Judge, Malegaon and the learned Additional District Judge held that by virtue of execution of an agreement to Sale, possession of the ground floor room remained with Plaintiff as part performance of contract and the defendant concealed the fact of execution of an agreement to Sale when he filed Regular Civil Suit No.132/1981 and obtained the decree. Hence the same is not binding on the Plaintiff. He, therefore, held that Plaintiff is entitled to get declaration that decree passed in Regular Civil Suit No.132/1981 is not binding on the Plaintiff.

8. The above mentioned order is challenged by the defendant in this Second Appeal.

9. While admitting the appeal, this Court *(CORAM:P.S.PATANKAR,J.)*has filed the following order :

> *"Admit.*
>
> *Substantial question of law as framed in ground Nos.2 and 3."*
>
> *The said grounds are as under :-*
>
> ***(2)*** *The Learned Judge committed grave error in holding that the decree properly*

passed against earstwhile tenant in Regular Civil Suit No.132/1981 was not binding on the Respondent. Having held that the husband of Respondent-Plaintiff was the tenant of the suit premises and after confirming the finding of the Trial Court that the Respondent-Plaintiff failed in her plea of Tenancy in the present suit, the Learned Judge could not grant declaration that the earlier decree was not binding on the Respondent-Plaintiff.

(3) *The Learned Judge erred in holding that the recital in agreement of sale which stated that one of the rooms on the ground floor was in the possession of the Respondent-Plaintiff as tenant confirmed the possession of Plaintiff under the Agreement. The said recital can not be read in isolation. The interpretation of the learned Judge is illegal and erroneous and admittedly the remedy of the Respondent-Plaintiff under the said Agreement of sale dated 8th March, 1980 has become time barred.*

10 In this appeal before me Shri Gavanekar, learned Advocate for the Appellant/Original Defendant submitted that the learned First Appellate Judge has failed to appreciate the fact that in the Municipal Record the name of Plaintiff's husband was shown as

tenant. He also submitted that the learned Judge even observed that Plaintiff has failed to prove that she is tenant of the suit premises. So, under such circumstances, there was no reason for granting decree for declaration to the effect that decree passed in Regular Civil Suit No.132/1991 is not binding on the Plaintiff. As against this, the learned Advocate for the Respondent submitted that Plaintiff had received the possession of one room situated on the ground floor as part performance of an agreement to Sale and as such there was no question of defendant getting possession of the same in a suit which was filed by him against Plaintiff's husband. He, therefore, supported the judgement and order passed by the learned Additional District Judge, Malegaon.

11. It is not in dispute that the suit house is owned by the defendant. From the material on record, it is also very clear that two rooms situated on the ground floor of the building were leased out by the defendant to Plaintiff's husband. It is also an admitted fact that Plaintiff and her husband are residing jointly in the rooms leased out to Plaintiff's husband. However, it must be noted that subsequently an agreement to sale was executed by the landlord i.e.

defendant in favour of present Plaintiff whereby he agreed to sale one room situated on the ground floor at eastern side and one room situated on the first floor of the eastern side to plaintiff for Rs. 6,500/- and accepted amount of Rs. 3,000/- as earnest money. It is pertinent to note that in the said agreement to sale it is mentioned :-

> " खालील खोलीचा प्रत्यक्ष कब्जा भाडेकरु म्हणून तुमचाच आहे. वरील रुमचा कब्जा खरेदीचेवेळी देईल "

12. Considering the fact that defendant had taken amount of Rs. 3,000/- by way of earnest money i.e. practically half of the amount of the total consideration. He must have put the defendant in possession of the ground floor one room as part performance of the agreement to Sale Exh-54 dated 08/03/1980 and that is why it is mentioned in the agreement that at the time of execution of the Sale Deed, possession of only one room will be given. So, it appears that defendant-landlord converted the possession of Plaintiff and her husband as tenant into possession by way of part performance of the agreement to Sale as he had received amount of Rs. 3,000/- from the Plaintiff. Once this possession is accepted then it

obviously means that subsequent to 08/03/1980 the ground floor one room situated on the eastern side was not in possession of the Plaintiff as a tenant but she was in possession of the same under the agreement to Sale.

13. Admittedly, the defendant had filed Regular Civil Suit No. 132/1981 only against husband of present Plaintiff alleging therein that he is a tenant of the two rooms situated on the ground floor. It seems that in the said suit, the landlord-present defendant did not disclose the fact that he has entered into an agreement to Sale Exh-54. Not only that but there is also nothing on record to indicate that after the execution of an agreement to Sale Exh-54, either Plaintiff or her husband were occupying the said room in capacity as tenant. So, under such circumstances when admittedly present Plaintiff who was in actual possession of one room was not party to Suit bearing No.132/1981, it can not be said that the decree passed in the said suit is binding on her.

14. There is another aspect of the matter. Usually, when the premises are let out to a person and he is residing there alongwith his family members then it

obviously means that he has taken the premises for and on behalf of all and if a decree is passed against such person the same is binding on his wife and children who are residing in the said premises and who are not having any separate independent tenancy rights. In the instant case, even if it is held that the possession of the Plaintiff of one room situated on ground floor was not received by way of part performance of the agreement to Sale still then it appears that in the agreement it is mentioned :

" खालील खोलीचा प्रत्यक्ष कब्जा भाडेकरु म्हणून तुमचाच आहे."

So, if at all it is the case of the defendant that the possession of the ground floor was continued with Plaintiff as tenant then obviously it was necessary for the defendant-landlord to implead the present Plaintiff in Regular Civil Suit No.132/1981 as according to him, she was in possession of the said room as tenant. But as she was not joined as party to the suit the decree passed therein is obviously not binding on her. It seems that the defendant-landlord wanted to take advantage of the amount of Rs. 3,000/- received by way of earnest money in agreement to Sale Exh-54 and at the same time, he wanted to evict the present Plaintiff and her husband from both the rooms

by alleging that they are tenants in the said room and have failed to pay the rent. Considering the peculiar facts and circumstances of the case, the learned first appellate Judge rightly held that the decree passed in Regular Civil Suit No.132/1981 is not binding on the present Plaintiff. Of course, I may say that the decree was pertaining to two rooms while the present Plaintiff received possession of only one room situated on the eastern side by way of part performance of the agreement to Sale. So, it has to be said that decree in Regular Civil Suit No.132/1981 at least to the extent of one room situated on the eastern side of the suit building is not binding on the present Plaintiff.

Hence I pass the following order.

O R D E R

1. Appeal is partly allowed.

2. The order passed by the Additional District Judge, Malegaon in Appeal No.467/1991 is modified and it is hereby declared that the decree passed in Regular Civil Suit No.132/1981 in respect of and to the extent of one room situated in the eastern portion of the suit building reference to which is made in agreement to Sale Exh-54 is not binding on the Plaintiff.

3. Under the circumstances of the case, parties to

bear their own costs.

(S.R. SATHE,J.)